Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 197

No. 76-1071

HUMBERTO MARTINEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey convicting the petitioner of violations of the laws of the United States, to wit, violation of Title 21 U.S.C. § 841(a)(1) - possession with intent to distribute heroin and the distribution of heroin. The petitioner has been sentenced to be confined for

fifteen (15) years followed by special parole term of ten (10) years on each count, the terms to run concurrently.

The petitioner is presently out on bail pending the determination of this petition.

1. OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISIONS SUSTAINING JURISDICTION

The jurisdiction of the Court rests on Section 1254(1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

The judgment of the Court of Appeals was entered on December 7, 1976. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied January 5, 1977. (See Appendix B.)

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional question raised by petitioner concerns the Fifth Amendment.

Were petitioner's rights under the Fifth Amendment violated when the government failed to make a participating, percipient informant, Victor Alers, available for possible use as a defense witness?

It is respectfully submitted that the decision of the United States Court of Appeals for the Third Circuit in the within matter is in conflict with the decisions of other circuit courts. To wit:

Ninth Circuit:

United States v. Hart-Robles ___F.2d ___ (9th Cir. 1976)(en banc);

United States v. Leon, 487 F.2d 389 (9th Cir. 1973);

Velarde-Villareal v. United States, 354 F.2d 9 (9th Cir. 1965);

Eighth Circuit:

United States v. Barnes, 486 F.2d 776 (8th Cir. 1973);

Second Circuit:

United States v. D'Angiobillo, 340 F.2d 453 (2nd Cir. 1965;

First Circuit:

United States v. Williams, 496 F.2d 378 (1st Cir. 1974).

4. STATEMENT OF THE CASE

On January 24, 1975, the Federal Grand Jury in and for the District of New Jersey, sitting at Newark, handed down a two count indictment charging the appellant, Humberto Martinez, with:

1. Knowingly possessing heroin with intent to distribute in violation of Title 21 U.S.C. § 841(a)(1) and;
2. Knowingly distributing said heroin in violation of the aforementioned statute.

Shortly thereafter, the undersigned was retained to represent the defendant and immediately thereafter contacted the United States Attorney's Office for the District of New Jersey to provide the name and address of any informant who was

material to the preparation of the defense (RT 132, 133). From the outset the United States Attorney's Office took the position that they were not required to divulge the requested information and rejected the request. ibid.

The defendant was arraigned on February 24, 1975 and entered a plea of not guilty to both counts.

On April 21, 1975, the defendant moved, inter alia, for an order directing the United States Attorney for the District of New Jersey to provide the defense with the name, address, and arrest and conviction record of the government informant who had been a percipient witness to the charges contained in the indictment. Once again, the United States Attorney's Office responded by denying that the defense was entitled to the information. On May 14, 1975 the court ruled that it would deny defendant's motion for such an order without prejudice to defendant's right to renew the motion upon filing with the court additional supporting affidavits.

On July 21, 1975 the defendant filed

with the court additional motion papers for pretrial discovery regarding the identity and present whereabouts of the informant and attached therewith an affidavit and supplemental memorandum of points and authorities. On September 29, 1975, the United States Attorney's Office responded by identifying Victor Alers as the percipient government informant and stating that his last known address was 743 Miller Avenue, Brooklyn, New York.

On October 21, 1975, the court after noting that the United States Attorney had informed the court by letter and memorandum that it had given the defendant the identity and last known address of the informant involved in the transaction at issue denied defendant's motion with respect to the request for other information relating to the informant's criminal record or data regarding his arrangements with law enforcement agencies (RT 133, 134).

Subsequently, defense counsel made efforts to retain an investigator in the New York, New Jersey metropolitan area and finally on November 14, 1975 employed

Richard Frischling of the Frischling Research Bureau to attempt to locate Victor Alers, specifically requesting that he ascertain when the informant was last seen at the Miller Avenue address in the event he could not locate Alers.

On November 23, 1975, defense counsel received a report from Mr. Frischling indicating that Alers had moved from the 743 Miller Avenue address at least seven months prior to that date.

Defense counsel then contacted Assistant United States Attorney Edward Plaza around Thanksgiving time of 1975 to attempt to ascertain additional information concerning the whereabouts of the informant and to determine whether the government had additional information in this regard. Defense counsel again stressed that he considered it imperative that Alers be interviewed by the defense prior to the trial so that an adequate defense could be prepared and to assure that Alers would be in court on any hearing on the motions to suppress evidence and at the time of trial.

At the beginning of the new year in

January of 1976 defense counsel finally received information from Richard Friedman, Esquire, Assistant United States Attorney to the effect that he had taken over the prosecution of the case and that the United States Attorney's Office was not attempting to locate Mr. Alers (RT 135).

On January 26, 1976, defense counsel sent a letter to the United States Attorney's Office asking for additional information so that it could attempt to locate Alers. Subsequently, defense counsel received a letter also dated January 26, 1976 to the effect that Mr. Friedman had become aware of the defense's inability to locate Mr. Alers and he was now requesting assistance from the defense to locate Alers.

On or about that same date, January 26, 1976, the defendant moved the court for an order suppressing as evidence in any criminal proceeding all evidence obtained by or resulting from the interception through use of wire taps by agents of the federal government of communications to which the defendant was a party. Hearing on the motions as well as the trial was set for February 17, 1976.

Some ten days before the February 17, 1976 hearing date, defense counsel received from Mr. Friedman a letter indicating Mr. Alers' past record and his date of birth (RT 135). It was at this time that defense counsel became aware that not only had the government failed to keep in touch with Mr. Alers, but that he was also a fugitive from an April 1975 indictment by the Kings County Grand Jury (Brooklyn) relating to an alleged sale of narcotics by Mr. Alers in November of 1974 (RT 135, 136).

On February 19, 1976, after hearing testimony and extensive argument, the lower court denied defendant's motion to suppress evidence and also denied defendant's motion to dismiss all charges because of the government's failure to expend every reasonable effort to make the informant available to the defendant to assist in the preparation of the defense and for possible use as a defense witness.

Trial commenced on February 19, 1976 without a jury and on February 20, 1976 the defendant was found guilty by Judge Meanor on both counts.

On April 19, 1976, the defendant was sentenced to the custody of the Attorney General of the United States for a period of fifteen years. He is now presently out on bail pending the outcome of this petition.

5. FACTS

In the matter before this Court, Agent Richard Sanchez of the United States Drug Enforcement Administration testified at a hearing on a motion to suppress evidence and at the trial to the effect that an informant by the name of Victor Alers consented to the tape recording of a conversation with the defendant and was present in his own vehicle with the defendant on January 16, 1975 in Jersey City, New Jersey when the Agent allegedly received contraband from the defendant. Government counsel conceded and the District Court Judge recognized that since Alers was a material witness it was required that he be produced as a government witness or that he be made available to the defendant for possible use as a defense witness at trial (RT 148, 179). The trial court indicated that if Alers was

not produced a dismissal of the charges were required unless the government met its burden of proving that they had made the requisite efforts to fulfill their obligations (RT 176, 179).

The Petitioner contended in the District Court and on his Appeal that a review of the evidence unequivocably demonstrated the government's failure to make a minimal, much less, "every reasonable effort" to produce Mr. Alers.

Agent Sanchez testified that he had very little contact with the informant between September of 1974 when he first met him at the Mercer County Jail to January 16, 1975 when the defendant was arrested in the informant's presence (RT 68). In addition, Alers had told Agent Sanchez that he did not want to testify in any of the cases he was going to become involved in and Sanchez had told him that he would make every effort to make sure that he did not have to testify (RT 64). Despite this, apparently no effort was made to persuade Alers or to direct him otherwise or to condition his continued employment upon his availability as a witness when

needed. Indeed, on the contrary, Agent Sanchez deliberately used Alers in such a way as to make him a percipient witness in the alleged transaction and to require his testimony in court but never told Alers that his appearance in court was obligatory.

Agent Sanchez did testify that he spoke with the informant's common-law wife on January 17 and January 19, 1975 but merely left a message for Alers to call him and never told her that Alers would be required to testify as a result of his participation in the Petitioner's case.

By January 22, 1975, just one week after the Petitioner's arrest, it should have become apparent to Agent Sanchez that Alers was no longer going to be cooperative since by that date all efforts to reach him at his business telephone had proved fruitless and on that date he was informed by a recording that the informant's home phone had been disconnected (RT 29).

Nonetheless, Sanchez did nothing. He made no effort to visit Alers' residence

or business address and directed no one to do so.

Finally on February 19, 1975 Sanchez received a telephone call from Alers in which he purported to be in Aguadilla, Puerto Rico. Even though Sanchez suspected from the outset that the phone call was not made from Puerto Rico and that Alers was lying to him, Sanchez made no effort to impress upon Alers the necessity of his being available to testify at trial (RT 30). Subsequently, when Alers failed to contact him within ten days as he had indicated he would do so, Sanchez still made no effort to personally look for him or have anyone else do so.

Sanchez did testify that he had made a minimal effort to check out the Aguadilla, Puerto Rico address by contacting a Bronx postal inspector who allegedly determined through an unknown source in Puerto Rico that an unknown letter carrier had concluded that the address given by Alers was erroneous.

Although the Drug Enforcement Administration maintains offices in Puerto Rico, Sanchez made no effort at that time to

inform them of his desire to locate this critical witness and have them conduct an investigation of Alers' whereabouts. Sanchez made no effort to contact Drug Enforcement Administration offices in this country to check on Alers whereabouts nor did he instruct any of his own associates to look for Alers.

Instead, Sanchez did nothing and some time during the spring of 1975 received a telephone call from the Brooklyn Police informing him that Alers was a fugitive from a Kings County Indictment charging him with sale of heroin.

Officer Caporacci of the Brooklyn Police did testify that he had gone to the Miller Avenue address in February of 1975 and also to the Smith Street address around March of 1975 but those efforts were insignificant at best and thereafter the only efforts made by the Brooklyn Police consisted of putting the word out "on the street" that they were looking for Alers and that modest attempt to locate him was terminated by the summer of 1975. It should be noted that these steps were not taken on behalf of the federal government and were in no way

directed to producing Alers at Mr. Martinez's trial but were directed for the purpose of arresting him for violation of New York State narcotics laws.

Still Sanchez did nothing even after receiving the information that Alers was a fugitive except to recontact the Brooklyn Police sometime around November of 1975 and in January of 1976 to see if they had any new information on Alers' whereabouts. This was true even though the defense had constantly from the outset emphasized to the United States Attorney's Office the necessity of knowing the identity and present whereabouts of the informant and of having him produced in court at the time of Martinez's trial and even though in September of 1975 the United States Attorney's Office recognizing its responsibilities had disclosed to the defendant the name and last known address of Alers. (It is interesting to note that in divulging this information the United States Attorney's Office did not indicate that it had received information from Agent Sanchez that Alers might be residing in Aguadilla, Puerto Rico.)

It was only in January of 1976, some one year after Martinez's arrest and only a few short weeks before the trial that Sanchez finally decided to take some additional steps and this was only on the direct instructions of the United States Attorney's Office after the defense had indicated that its extensive efforts to locate Alers had been unsuccessful.

Even then, Sanchez did not go to the Miller Avenue address or the 289 Smith Street address to talk with neighbors, proprietors of business establishments in the community, landlords, superintendents etc. Even then, Sanchez nor any other federal law enforcement officer went to the Santa Barbara Bar in Brooklyn or the restaurant on 116th Street in Manhattan where Sanchez had previously met with Alers.

Only then did Sanchez check with Con Edison, the Post Office, the Manhattan Correctional Institution and with the National Computer on Criminal Identification to attempt to determine Alers' whereabouts and only then did Sanchez contact the Drug Enforcement Administration in

San Juan. Never did any representative of the federal government check with social security or make efforts to locate Alers' co-defendant on the New Jersey charge or Alers' common-law wife Rosa Eroza also known as Rosa Cabrera.

6. ARGUMENT

It is clearly established law that when a government informant is a potentially material witness and that particularly when the informant is an active participant in the charged criminal activity, the government has a duty to expend "every reasonable effort" to make the informant available to the defendant for possible use as a defense witness. United States v. Hart-Robles, ___F.2d___ (9th Cir. 1976)(en banc); United States v. Leon, 487 F.2d 389 (9th Cir. 1973); United States v. Barnes, 486 F.2d 776 (8th Cir. 1973); Velarde-Villareal v. United States, 354 F.2d 9 (9th Cir. 1965).

See also United States v. Williams, 496 F.2d 378 (1st Cir. 1974); United States v. D'Angiobillo, 340 F.2d 453 (2nd Cir. 1965).

In Velarde-Villareal v. United States, supra, the court said:

"The practice of the government in employing agent-informers in narcotics cases is well known. We also know that such agents are not trained officers - often they are themselves addicts or former addicts. The government must know that an eager informer is exposed to temptations to produce as many accused as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well. One could hardly expect such informants always to stay on the proper side of the law which separates these two cases. And since the government chooses to utilize such agents, with the attendant risk of entrapment, it is fair to require the government which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished." 354 F.2d at p. 13.

It was contended at the time of the Petitioner's appeal that the efforts of the federal government were not only too little but were far too late to meet the standard of diligence required under the law to justify their failure to produce Alers at trial. Petitioner argued that it could not be realistically claimed that the federal government made every reasonable effort to locate Alers as required by the decisions of the aforementioned United States Circuit Courts of Appeal.

Petitioner contended and contends here that it is difficult to imagine a situation where law enforcement officers did less to locate an informant in a case where the informant's testimony was as critical, particularly in a situation such as here where the informant was alleged to be the source of the narcotics and no effort was made to supervise the informant or to search his person or his vehicle before the critical meeting took place at the Holiday Inn in Jersey City.

Accordingly petitioner contends that this case should be controlled by the rules set forth by the court in United

States v. Hart-Robles, supra; United States v. Velarde-Villareal, supra, which require the government to demonstrate diligence in order to justify their failure to produce a participating, percipient informant at the time of trial.

7. REASONS FOR GRANTING WRIT

The constitutional question raised by the Petitioner concerns the Fifth Amendment.

As indicated previously, it is petitioner's contention that the Third Circuit Court of Appeals committed error of constitutional dimension when it ruled in essence that the defendant's rights under the Fifth Amendment of the United States Constitution - in particular the right to due process of law - was not deprived by the government's failure to produce the participating percipient informant.

Petitioner contends that the lower Court's action violated petitioner's rights under the Fifth Amendment and further contends that the Third Circuit decision in this matter presents a question directed to the Court's supervision of

the United States District Courts and Courts of Appeal because of a conflict between the Third Circuit Opinion and opinions of the First, Second, Eighth and Ninth Circuits.

8. CONCLUSION

For the reasons given, Certiorari should be granted and the Judgment should be reversed.

Respectfully submitted,
ALVIN S. MICHAELSON
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1632

UNITED STATES OF AMERICA,
Appellee,

v.

HUMBERTO MARTINEZ,
Appellant.

Appeal From
the United States District Court
For the District of New Jersey
D.C. Criminal No. 75-44

Submitted Under
Third Circuit Rule 12(6)
on October 21, 1976

Before HUNTER, STALEY and GARTH,
Circuit Judges

Jonathan L. Goldstein
Brian D. Burns
Attorneys for Appellee

Alvin S. Michaelson
Attorney for Appellant

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit, that:

1) a reversal of the judgment below is required because the government failed to produce the informant, Victor Alers, at the hearing on the motion to suppress evidence and failed to introduce sufficient evidence to prove his free and voluntary consent to the wiretap;

2) a reversal of the judgment below is required because the government failed to make Victor Alers available for possible use as a defense witness at trial;

3) the trial court erred when it permitted the introduction into evidence of the recording without proper authentication;

4) the trial court erred when it denied appellant's motion for a judgment of acquittal based upon this court's decision in United States v.

West, 511 F.2d 1083 (3d Cir. 1975);

5) there was insufficient evidence to convict appellant;

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ James Hunter, III
James Hunter, III,
Circuit Judge

Attest,

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

Date: DEC 7 1976

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1632

UNITED STATES OF AMERICA,
Appellee,

v.

HUMBERTO MARTINEZ,
Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III

James Hunter, III,
Judge

Dated: January 5, 1977